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TERRORISM TRIALS: MILITARY COMMISSIONS

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How much deference should Congress receive in determining when military commissions are necessary incidents of war? That's the real nub of the dispute between Steve and amici arguing to the D.C. Circuit that Article III did not bar the military commission conviction of Ali Hamza al Bahlul, whom the en banc court has already described as committing acts that "directly relate" to September 11. Amici agree with Steve that Article III does not bar Congress from designating military commissions to try violations of the "law of war." We disagree, however, on the deference owed to Congress in prospectively defining the "law of war" under the Make Rules Clause, the Define and Punish Clause, and the Necessary and Proper Clause. Our answer is that Congress should receive deference that is broad, but not unlimited. Amici contend that violations of the "law of war" in which military commission jurisdiction is consistent with Article III go beyond acts that constitute war crimes under international law. Steve disagrees. I. U.S. Practice and the "Law of War" *Ex Parte Quirin* exemplifies the deference that Congress is owed. In dicta and holding, *Ex Parte Quirin* groups a wide range of offenses under the "law of war," including espionage and unlawful belligerency. The status of a number of these offenses under international law has been unclear for decades. These offenses have in common a breach of what preeminent U.S. law of war theorist William Winthrop termed the "laws and usages of war" – expectations developed in what *Quirin* called a "long course of practical and administrative construction" in the U.S. from the Revolutionary War to World War II. Congress's effort to codify this "course of practical… construction" in the Military Commissions Act of 2006 (MCA) is precisely the kind of legislative action that the Framers had in mind under the Define and Punish Clause. As Madison noted in Federalist No. 37, an interpreter of a body of law's "several objects and limits" cannot hope to match science's "perfectly accurate… delineations." Instead of attempting the impossible, an interpreter can only hope to distill a "course of practice." In the MCA, Congress distilled a long course of U.S. practice regarding the "law of war" that included both violations of international law and violations of domestic law, such as espionage, that international law *allowed* states to punish. The *Quirin* Court's use of the term, "law of nations," encompasses both of these contexts.

II. Deference to Congress and the Necessary and Proper Clause If, as *Quirin* notes, military commissions are an "important incident" of Congress's war powers, the validity of Congress's creation of commissions is also informed by the Necessary and Proper Clause, which the Roberts Court recently read broadly in *United States v. Comstock*. As Chief Roberts explained in *Comstock*, echoing John Marshall, "a government… entrusted with" such powers "must also be entrusted with ample means for their execution." Congress's necessary and proper creation of commissions is by definition consistent with Article III. Steve reads "necessary" in the Necessary and Proper Clause as "absolutely necessary." He contends that Congress is not entitled to deference if it merely believes that military commissions are a valuable supplement to the deterrence provided by Article III tribunals. Steve argues that every exercise of commission jurisdiction must be an essential deterrent. Absent proof that military commissions are an essential option, they are invalid under Article III. However, as Chief Justice Roberts recognized in *Comstock*, that is not the test of Congress's power under the Necessary and Proper Clause. Chief Justices Roberts and Marshall declined to make Congress jump through the hoops that Steve seeks to interpose. From *McCulloch* to *Comstock*, the Court has required only that laws were "convenient," "useful," or "conducive" to exercise of Congress's enumerated powers. Madison, writing in Federalist No. 42, applied this reasoning to the Define and Punish Clause, arguing that deferring to Congress's definition of offenses against the law of nations "was in every respect necessary and proper." The Necessary and Proper Clause gives Congress all the power it needs to hold that military commission trial of conspiracy to murder civilians, the charge on which al Bahlul was convicted, is a "useful" means to deter the completed murder of civilians. Steve and amici agree that the completed murder of civilians is a war crime under international law. Commission jurisdiction over conspiracy to murder civilians is reasonably related to prevention of that acknowledged war crime. Amici submit that Congress should not have to wait until a conspiracy is completed, given the substantial risk to life involved. If amici are correct about the deference owed Congress's definition of a reasonable relationship to an acknowledged war crime, Article III presents no bar to military commission jurisdiction over such offenses. III. The Appropriate Ambit of Article III In *Quirin* and other cases, courts have viewed reasonableness, not absolute necessity, as the touchstone Article III inquiry in defining the scope of both courts-martial and military commissions. In *Solorio v. United States*, the Court held that courts-martial of members of the military did not require that an offense be "service-connected." Instead, the Court suggested, the military's reputational interest in accountability for its members supported courts-martial jurisdiction, even for ordinary crimes. The Court did not view Article III as a bar to this conclusion. Steve's citation of the bankruptcy case of *Stern v. Marshall* is simply inapposite to the military justice context. In *Stern*, the Court held that Article III barred adjudication of a state law tort claim by a bankruptcy judge who lacked the protections of Article III, such as lifetime tenure. Under a course of practice starting before the Constitution's enactment, final judgments on state tort claims have been the exclusive province of either state courts or federal Article III courts exercising an appropriate form of federal jurisdiction. In contrast, since General Washington's use of military commissions during the Revolutionary War, military tribunals have determined a broad range of legal issues concerning the conduct of war. IV. Limits on Military Commission Jurisdiction Steve and I agree that Congress does not have unfettered discretion to define offenses that violate the "law of war." Those offenses must reasonably relate to the armed conflict. Any incidental offense, such as littering, committed by a belligerent lacks the requisite nexus with hostilities. Only conduct related to an armed conflict poses the risk that a belligerent will exploit disparities in commission jurisdiction (like those between martial, occupation, and law of war commissions) to frustrate the United States' military effort through conduct violating the "laws and usages of war." In addition, amici assume under the law of this case that al Bahlul's conviction complies with the Ex Post Facto Clause, which requires fair warning of the possibility of prosecution before the offending conduct occurs. U.S. practice alone may not supply that fair warning. The en banc D.C. Circuit found fair warning in *al Bahlul*, but only on a plain error standard that will not govern cases where defendants contest jurisdiction. A conspiracy conviction in a military commission might be legal under the Ex Post Facto Clause, but only in a case like al Bahlul's where (as the en banc court explained) "substantially uncontroverted" evidence showed that the underlying conduct of the defendant "directly relate[d]" to an internationally

recognized war crime, such as the murder of civilians. (As our amicus brief notes, that would also be a basis for upholding the conviction here on Article I and Article III grounds, particularly given the relaxed standard of pleading embraced by the Supreme Court in *Dynes v. Hoover*.) V. Conclusion The Ex Post Facto Clause is no longer in play in this round of *al Bahlul*, because of the en banc court's holding. Steve contends that the en banc court's decision changes nothing, because Article III merely restates the Ex Post Facto Clause's standard. Amici believe that the en banc court's holding means more. With the element of fair warning removed, Congress should enjoy significantly greater deference, especially in light of the Necessary and Proper Clause. Narrowing the deference owed Congress second-guesses Congress's determinations about the "useful" exercise of its war powers. *Milligan* overturned a military commission's conviction of a civilian, where war powers are not necessary. In contrast, the Supreme Court has never second-guessed a military commission conviction of a belligerent on either Article I or Article III grounds. Doing so here would withhold from Congress the deference that Madison believed it was owed in defining the law of nations.

Topics: Terrorism Trials: Military Commissions

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